Summary of and response to submissions

Proposed Fire and Emergency New Zealand

Dispute Resolution Scheme Rules

1 September 2020

Table of contents

Executive summary

This document summarises and analyses the submissions received on the proposed Fire and Emergency New Zealand Dispute Resolution Scheme Rules (consultation draft 25 November 2019). It outlines, with supporting rationale, the changes we made, along with those we did not make, as a result of submissions. These changes appear in the final version of the Rules as approved by the Minister of Internal Affairs.

The consultation was open from 12 December 2019 to 24 February 2020. We received 26 submissions.

The Rules are in five Parts. We asked for submitters' views on each Part and on some specific rules. Submitters also had an opportunity at the end of the survey to identify and comment on any important Scheme design or process issues they thought we had not covered in the Rules.

Overall, there was a high level of general support for each Part of the Rules, with only a very small number of submitters objecting to any given Part or specific rule. There were, however, several specific rules where submitters suggested additional clarification or, in some cases, changes. Principal among these were:

- Requirement for the Scheme Administrator to notify Fire and Emergency's Chief Executive of all disputes accepted into the Scheme (rule 19)
- Lack of a rule outlining an expectation of the time the dispute resolution process should take
- Ability to have, and awarding costs of, representation by lawyers
- Adjudicators' recommendations to Fire and Emergency (rule 37)
- Appeals by a party aggrieved by a decision made under the Scheme (rule 41).

After considering these comments, we made the following changes:

Part	Title	Changes
1	Purpose and jurisdiction of Scheme	No change
2	Dispute resolution application	No substantive changes
3	Dispute resolution process	Several minor technical changes to various rules
4	Remedies, recommendations, declarations and orders	• Introduction of a new subrule under which an adjudicator may recommend to Fire and Emergency that it carries out a restorative process between parties, and with any other person who may be impacted by the dispute or its resolution. As with all other existing recommendations contained in the consultation draft of the Rules, any such recommendation made by an adjudicator would be non-binding. • Introduction of a new rule giving parties the ability to apply for a review of an adjudicator's decision on limited grounds relating to the dispute resolution process. This will not provide an opportunity for review or appeal where a party disagrees with the outcome of the adjudication. In that case, as per the consultation draft of the Rules, the party would have to appeal to the District Court.

Part	Title	Changes
5	Administration of Scheme	• Addition of general recommendations made to Fire and Emergency by adjudicators to the information to be provided in the Scheme Administrator's annual report to Fire and Emergency's Board. • Several minor technical changes to various rules

Introduction

Purpose of this document

This document summarises and analyses the submissions received on the proposed Fire and Emergency New Zealand Dispute Resolution Scheme Rules (consultation draft 25 November 2019). It sets out and explains the changes we made, along with those we did not make, as a result of submissions.

Structure of this document

This introductory section provides background to the consultation, details of how it was promoted, the number of submissions received and how they were analysed.

The remainder of the document follows the structure of the Rules. The Rules consist of five parts, as shown in Table 1. That order and structure are used to present the summary of submissions and our response to them.

Table 1: Rules structure

Part	Title
1	Purpose and jurisdiction of Scheme
2	Dispute resolution application
3	Dispute resolution process
4	Remedies, recommendations, declarations and orders
5	Administration of Scheme

Terminology

The Rules use the acronym “FENZ” for Fire and Emergency New Zealand. Both terms are used interchangeably in this document.

Similarly, the Rules use “Administrator” for the person administering the Scheme. Once again, both the terms “Administrator” and “Scheme Administrator” are used interchangeably in this document.

Any reference to the rule(s) we proposed, is a reference to the rule(s) contained in the 25 November 2019 version of the Rules, which was the version of the Rules released for consultation.

Background to the consultation

Fire and Emergency New Zealand required to develop a Dispute Resolution Scheme

It is important that people within the communities we serve and the people who volunteer for Fire and Emergency have a right to dispute our actions or decisions, and a fair process that enables them to do so.

As required by section 178 of the Fire and Emergency New Zealand Act 2017 (the Act), Fire and Emergency is developing a Dispute Resolution Scheme that will replace the interim process that has been in place since the organisation was established in 2017.

This Scheme will be one way that Fire and Emergency volunteers and members of the public can raise and seek resolution of disputes.

Earlier consultation

In April 2019, we consulted on some high-level design elements of the proposed Scheme. We received 70 submissions. The submissions helped us to develop a set of Rules for the Scheme that prescribe in more detail how the Scheme will operate.

Consultation submissions that we summarise and analyse in this document

From 12 December 2019 to 24 February 2020, we consulted on the proposed Rules. The Rules tell us the purpose of the Scheme, who can use it and why, how to apply, how the process will work, what the resolution outcome could be, and how the Scheme will be administered.

How we promoted the consultation

The Rules, together with collateral such as easy reads and process flow charts, were loaded onto the consultation page of our external website. During the 10-week consultation period, there were 668 visitors to this page and 306 unique downloads.

This was aided by extensive internal communications to Fire and Emergency personnel (at launch, mid-period and near the closing of submissions).

We promoted awareness among the public via advertisements in regional newspapers (15 January 2020), social media posts and emails to stakeholders. The consultation featured in *LawPoint*, the Law Society's independent newsletter (7 February 2020), as well as on psnews.co.nz, a public sector facing news organisation (12 February 2020).

Number of submissions we received

In all, we received 26 submissions, as shown in Table 2.

Table 2: Number of submissions

Submitter (self-identified categories)*	Online	Written	Total
Fire and Emergency Volunteer (current)	14	1	15
Fire and Emergency Volunteer (past)	1	–	1
Fire and Emergency employee	3	–	3
Other	–	2**	2
Member of the public (either an individual or a representative of a group, association or the like)	5		5
Total	**23**	**3**	**26**

* This was intentionally an anonymous survey (submitters were not required to provide their names) and this was the only administration questioned asked.

** One from the Rural Professionals Association (RPA) and the other from the United Fire Brigades' Association (UFBA). The RPA represents its members on matters pertaining to the business (operational and management) of what was previously the business of Rural Fire Authorities within New Zealand, now part of Fire and Emergency New Zealand. The UFBA members consist of volunteer, paid, urban, rural, industry and defence brigades, with around 80% being volunteers. The UFBA ran its own survey, which attracted over 300 responses, to inform its submission.

Our approach to summarising and analysing submissions

The order of consultation questions followed the order of the Rules; after an opening administrative question (Question 1), Questions 2 and 3 were about Part 1 of the Rules, Questions 4 and 5 about Part 2 and so on.

The summary and analysis of submissions presented in this report are therefore ordered sequentially by Parts of the Rules.

Generally, we first recap the specific proposed rules and the thinking behind them. We then show the level of support (or otherwise) from submitters for the rule(s) and discuss any changes they suggested. We have used anonymised verbatim extracts from submissions where they best illustrate the submitter's point; otherwise we present summaries of the points. (The two exceptions are the RPA and the UFBA, as both submitted under their own name (letterhead) rather than anonymously.) We conclude each section by stating whether we changed any rules as a result of the submissions or kept them as they were originally proposed; that is, retained the 25 November 2019 consultation version of the rule.

General conclusions

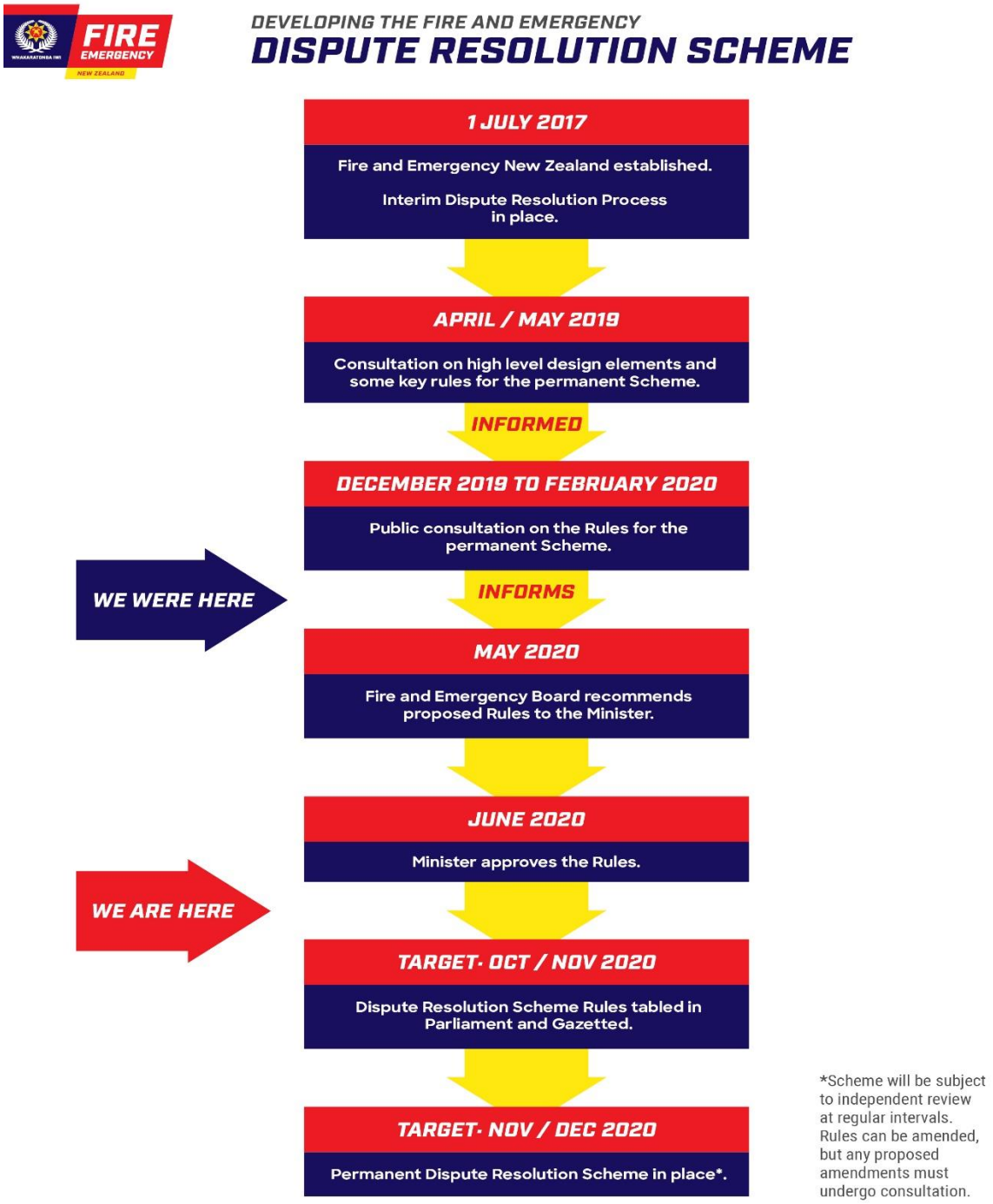
Overall, there was a high level of general support for each Part of the Rules, with only a very small number of online submitters objecting to any given Part or specific rule. There were, however, several specific rules where a small number of online submitters suggested additional clarification or, in some cases, that changes would be helpful.

The RPA was supportive of the proposed Rules, with a few suggested improvements. With two exceptions, the UFBA supported the Rules.

Scheme design through to Scheme implementation process

The flow chart of the Scheme design and implementation process below shows:

- where the consultation fitted into the process
- where we are now.



Part 1 of the Rules: Purpose and jurisdiction of Scheme

What is covered in this Part

Part 1 contains the proposed rules around the purpose of the Scheme, the disputes that may be dealt with under the Scheme, who may apply, and the obligation to attempt to resolve the dispute before entering the Scheme.

We explicitly asked submitters for their views on the requirement that, with some exceptions, a person must attempt to resolve their dispute through the Fire and Emergency complaint process before applying to the Dispute Resolution Scheme (rule 8). We also asked whether there were any other rules in Part 1 (Purpose and jurisdiction of Scheme) they would like to comment on.

Obligation to attempt to resolve dispute before applying to Scheme (Rule 8)

All online submitters, except one, answered this question and all, but one, supported this proposed requirement.

The submitter that did not support the requirement made the following observation: “Disputes process is better than complaints. One process is adequate, not two”.

One submitter, while supporting the requirement made the following observation. “The scheme should provision for early resolution by formal means, before it goes through the formal process. Rather than a structured process, I would recommend that an ombudsman type scheme would have merit rather than a hierarchical dispute resolution structure. If there was an ombudsman process, then when the complaint came into the office of the ombudsman, there could then be a flexible approach to direct this to early resolution, facilitation, mediation or referring to adjudication. This would enable a more flexible approach to managing disputes.”

Our conclusion

We have kept rule 8 as written in the consultation draft (25 November 2019), given the level of support from submitters.

Other rules in Part 1

We received only two comments, neither of which has led us to revise any of the proposed rules in this Part.

One comment was about the ability of the Scheme Administrator to “arbitrarily” dismiss a dispute [read not accept a dispute in the Scheme]. We took this to be a reference to rule 6 – Disputes that may be dealt with under the Scheme. It could also relate to rule 16 in Part 2 – Situations where administrator must refuse to accept application. Both these rules are there for transparency and clarity. These rules provide the only basis on which the Scheme Administrator can refuse to accept a dispute; that is, there must be a reason and that reason must be one of the ones in the Rules. So, by definition, the Scheme Administrator cannot arbitrarily dismiss an application. Additionally, a decision made by the Scheme Administrator to refuse an application can be reviewed (rule 18). Collectively, these guard against the Scheme Administrator making arbitrary decisions.

The other was a general comment “not clear for external parties with a complaint how they can complain under this”. This could have referred to one of two matters:

- The Fire and Emergency complaint process which, as discussed earlier, rule 8 requires that (with some exceptions) a person must have attempted to use to resolve their dispute prior to applying to the Dispute Resolution Scheme

  or

- How a party to a dispute in the Dispute Resolution Scheme can complain about the operation of the Scheme.

If the submitter was referring to the Fire and Emergency complaint process, this is a separate process and information about it (along with information about the Dispute Resolution Scheme) will be available on Fire and Emergency's website.

If the submitter was referring to making a complaint about the Scheme, this is provided for by rule 49, which requires the Scheme Administrator to have, and publicise, a process for receiving and resolving complaints about the operation of the Scheme.

Our conclusion

We kept all Part 1 rules as written in the consultation draft (25 November 2019), given the level of support from submitters.

Part 2 of the Rules: Dispute resolution application

What is covered in this Part

Part 2 contains proposed rules associated with the application process, including time limits on applications, method of application, and what the Scheme Administrator must do when they receive an application.

Dispute resolution application rules

Submitters were asked their views on the application rules as a package, as well as being explicitly asked about their views on the requirement for the Dispute Resolution Scheme Administrator to notify Fire and Emergency's Chief Executive of certain matters (rule 19).

All online submitters, except one, answered the general question and all of them supported the proposed process and requirement.

We discuss specific issues raised by submitters below.

Applications to be made to Board

One submitter questioned the merits of having to make the dispute application to the Board, when all the Board can do is send the application to the Scheme Administrator. Almost all applications are to be made directly to the Scheme Administrator. The only exception is when a Fire and Emergency volunteer appeals against the requirement to leave Fire and Emergency compulsorily due to incapacity. While the Act (section 35(3)) requires that these appeals are handled under the Dispute Resolution Scheme, section 35(2) of the Act requires that these appeals are commenced by notice of appeal delivered to the Board of Fire and Emergency. The proposed rule 10(3) requires the Board to then pass the application to the Scheme Administrator.

In practice, this could be set up administratively so the Board does not have to separately receive the application by, e.g. setting up an email and a postal address for these applications that would be monitored by the Scheme Administrator on behalf of the Board. These addresses would be on the Fire and Emergency website with a statement that an application will be considered to have been made to the Board if it is sent to either of those addresses. If people send applications directly to the Board or a member despite this, then the Board would have to send them on.

Timeframes within which application are to be made

The UFBA commented specifically on rule 9(3) – Time for application to Scheme. That rule requires that an applicant must lodge a dispute within 90 days of them being notified of the outcome of the Fire and Emergency complaint process, with rule 9(4) allowing some flexibility around that timeframe. The 90-day timeframe and allowing for its flexibility were a direct result of the earlier (April 2019) consultation on that rule, where submitters were asked to indicate a preference from a range of timeframes, including no timeframe. The most common response was a preference for a timeframe of 90 days, and some submitters also called for flexibility. In its February 2020 submission, the UFBA said that it believes that 90 days is sufficient time but was pleased to see the Rules allow for some flexibility.

Appointment of dispute resolution practitioner (rule 15)

The UFBA suggested we consider allowing parties to challenge with justification the appointment of a dispute resolution practitioner without it impacting adversely on the party's case.

In considering this suggestion, we were mindful of the following proposed rules, which would provide some protection:

- The Board must ensure that sufficient numbers of suitably qualified and independent facilitators, mediators, adjudicators and investigators are available for timely appointment, so as to ensure the effective functioning of the Scheme (proposed rule 46(1)).
- Dispute resolution practitioners (facilitators, mediators, adjudicators) and investigators must declare any conflict of interest and, unless all parties agree in writing, must withdraw from the dispute (rule 25).

As a result of the UFBA's submission, we changed rule 25 – Disclosure of conflict of interest, previous involvement with parties, etc. – to make it clear that if any party to the dispute (not just the dispute resolution practitioner or investigator) considers that a dispute resolution practitioner or an investigator has a conflict of interest, they must disclose this and the dispute resolution practitioner or investigator and parties can then agree on what action is required as a result. If no agreement can be reached, a new dispute resolution practitioner or investigator must be appointed.

Approved leave until the dispute is dealt with

A Fire and Emergency employee submitter suggested that, "in line with health and wellbeing strategies and to avoid further conflict whilst application is progressing: the applicant should be placed on approved leave until the complaint is dealt with. This would assist to negate any frivolous or vexatious complaints as it has been generally perceived that the process somewhat favours the complainant/applicant."

Our response is that such potential decisions/actions are a matter for Fire and Emergency and are not within the scope of the Dispute Resolution Scheme.

Our conclusion

We kept rules 9–18 as written in the consultation draft (25 November 2019), given the level of support from submitters.

We changed rule 25 – Disclosure of conflict of interest – to make it clear that disclosure must be made where any party to the dispute considers a dispute resolution practitioner has a conflict of interest and not just when the dispute resolution practitioner or investigator considers they have a conflict.

Requirement for the Scheme Administrator to notify Fire and Emergency's Chief Executive of certain matters (rule 19)

Rule 19 requires the Scheme Administrator to notify Fire and Emergency's Chief Executive, or someone designated by the Chief Executive, of every dispute accepted into the Scheme. This notice will include the parties' names. The Scheme Administrator is also required to notify the Chief Executive if anyone acting on behalf of Fire and Emergency does not participate, or does not participate in good faith, in the dispute resolution process. The Chief Executive has to make sure that these notifications do not negatively impact the parties to the dispute and that the dispute stays confidential.

The thinking behind this proposed rule was that the Chief Executive needs to know about disagreements within the organisation. The notification does not allow the Chief Executive to get

involved in the dispute or share this information with other people. The notification to the Chief Executive about Fire and Emergency representatives who do not participate, or do not participate in good faith, in the dispute resolution process is to make sure that Fire and Emergency meets its obligation to participate in the Scheme under the Act.[1] Applicants are entitled to go through the process, and Fire and Emergency is required to participate.

Table 3 shows online submitters'[2] level of support for this requirement.

Table 3: Level of support for the requirement for the Scheme Administrator to notify Fire and Emergency's Chief Executive of certain matters

Option (as worded in the survey)	Total number of online submitters	Percentage of online submitters*
Supported	12	52
Supported but suggest some changes	3	13
No view as not seen as overly important aspect to the submitter	6	26
Object to some aspect of the rule	1	4
Not answered	1	4

*Percentages do not total to 100% due to rounding.

All submitter types were represented in the response "No view as not seen as overly important aspect" (FENZ volunteer n=4, FENZ employee n= 1, member of the public n=1). This was also the case with those that supported the rule (FENZ volunteer n= 9, FENZ employee n=2, member of the public n=3).

Notification: Should this include the names of the parties to the dispute?

The UFBA highlighted to its members that if you apply to the Scheme, your name and the names of any other party will be given to the Chief Executive of Fire and Emergency or their delegate. It asked whether this would prevent them from lodging a dispute. Of those who completed the UFBA survey, 30.79% said it would prevent them from lodging a dispute and 67.88% answered that it would not prevent them.

One online submitter who supported the rule made the following suggestion: "I don't think it should include names unless it's deemed necessary information."

After carefully considering this feedback, we did not propose any changes to the rule itself. We do, however, now see the need to give special attention to this issue in the operational guidelines (currently under development).

Our rationale for keeping the rule as it is, is:

- The Chief Executive, in their role as Chief Executive, must be aware that there is a dispute with, or within, Fire and Emergency. It is part of the remit of their role to be notified of such things.

[1] Section 183(2)(c): If Fire and Emergency is a party to a dispute accepted into the Scheme, it must participate in accordance with the rules of the Scheme.

[2] The three paper-based submissions did not follow the survey format, so we cannot include them in any statistics in this and other similar tables in this report. We do, however, report and analyse suggestions on specific rules contained in these paper-based submissions in the relevant sections of this report.

- It is important to ensure that Fire and Emergency is able to make connections between the dispute and other matters occurring in the organisation to ensure that such things are handled correctly.

This is also the rationale for including the names of the parties. More specifically, when considering the issue of whether or not to include the names of the parties in the notification, the objective was to ensure the privacy of the parties to the dispute is maintained, while also ensuring that the Chief Executive is able to fulfil their duties and obligations within the Fire and Emergency Act and the Health and Safety at Work Act 2015.

Therefore, we considered the following when deciding to include the names of the parties in the notification:

- The Chief Executive must be able to ensure privacy if details of a dispute become known in parts of the organisation through channels outside of the formal management structure, such as rumours and second-hand conversations. The Chief Executive can then try to contain and prevent those conversations that may cause harm to the applicant.
- Being aware of all disputes ensures the Chief Executive can maintain their sensitivity to the applicants and ensure they hold appropriate conversations. For example, the Chief Executive may become engaged in a conversation or situation that would be acceptable in some circumstances, but causes a conflict of interest in the context of the dispute.
- As part of the efficient and effective administration of the Fire and Emergency Act, it is worth noting that some complainants use multiple channels to progress their concerns simultaneously. If there is not a point in the organisation that is aware of the disputes currently in progress, it would be possible for multiple decisions to be made, inconsistency in responding to the complainant or organisational confusion due to different parts of the organisation duplicating work.
- It is inappropriate for the Rules of the Scheme to impose greater restrictions regarding confidentiality than is required under the Fire and Emergency Act.
- It would be highly irregular if the Chief Executive of any organisation was not only unaware of a dispute happening inside the organisation, but also prevented from being aware of it. This would not happen under employment law, and Fire and Emergency cannot see a principled basis for it to occur under a dispute resolution scheme.

We note the feedback from the UFBA that this notification may prevent some people from applying. We agree that this is not ideal, but we still cannot endorse the Chief Executive not being aware of disputes with, or within, Fire and Emergency. To help alleviate the concerns, we will ensure supporting information is developed for applicants explaining the rationale for including this requirement and the parameters of what the Chief Executive is able to do with the information once they receive it, as well as providing a clear privacy statement.

Notification: Role of Chief Executive and Chief Executive's delegate

Proposed rule 19(3) was that the Chief Executive must take reasonable steps to ensure that receipt, or knowledge, of a notice given under this rule does not result in any person named as a party in that notice being adversely affected (for example, to ensure that an applicant is not adversely affected in their workplace simply because they brought a dispute under these Rules), and that confidentiality is maintained.

The UFBA would like the Rules to include protections to clarify the expectation that the information will not be passed on to any other party (including the parties' managers), nor will it be used in any way to disadvantage the parties with anybody else. It asserted we could clarify some ambiguities around what is deemed "the delegate" to assure applicants about the level of access to confidential information. It suggested we could achieve this by amending the wording of proposed rule 19(3) to

be clearer about the confidentiality of the information obtained by the Chief Executive and clarify that this information will not be passed to other parties, unless necessary to fulfil resolution outcomes.

Another submission that supported the Rules included the following suggested change:

"Clause 19(1) states 'The administrator must provide the Chief Executive or their delegate with written notice of ….'. Clause 19(3) requires 'The Chief Executive must take reasonable steps to ensure …'. [We] suggest to maintain absolute clarity 19(3) should read 'The Chief Executive *or their delegate* must take reasonable steps to ensure …'."

Our response to these comments:

- We agree with the suggestion of adding "or their delegate" to rule 19(3). We note that we believe the wording proposed in the 25 November 2019 version of the Rules would still have worked because it requires the Chief Executive to ensure the delegate avoids doing something that results in the adverse effects, but adding "or their delegate" would also clearly put that ultimate responsibility on the person receiving the notice. We can see that it would make sense to include "or their delegate" given the delegate may be the one receiving notices.
- In addition to rule 19(2)(b), the reasonable steps to be taken in rule 19(2) could include requiring someone else to set up processes or systems that ensure that information is not shared inappropriately. The Chief Executive would remain responsible for the effectiveness of these processes or systems.

Our conclusion

We did not make any substantive changes to rule 19, given the level of support from submitters.

We note the feedback from the UFBA that this notification may prevent some people from applying. We agree that this is not ideal, but we cannot endorse the Chief Executive not being aware of disputes with, or within, Fire and Emergency. To help alleviate the concerns, we will ensure we develop supporting information for applicants explaining the rationale for including this requirement and the parameters of what the Chief Executive is able to do with the information once they receive it, as well as providing a clear privacy statement.

For consistency and clarity, we changed rule 19(3) to read: "The chief executive *or their delegate* must take reasonable steps to ensure that receipt, or knowledge, of a notice given under this rule does not result in any person named as a party in that notice being adversely affected (for example, to ensure that an applicant is not adversely affected in their workplace simply because they brought a dispute under these rules), and that confidentiality is maintained."

Part 3 of the Rules: Dispute resolution process

What is covered in this Part

Part 3 contained proposed rules associated with the resolution process itself, including confidentiality provisions (rules 23 and 39) and the roles of lawyers, advocates and support people (rules 20–22). We asked submitters their views on those two aspects in particular, and the other rules in general.

Confidentiality

What we proposed

The process and outcome (agreement reached, if any) of facilitation and mediation are both confidential to the parties to the dispute, unless all parties agree otherwise in writing. "Process" in this context means anything said or provided as part of the process, such as a document or statement (rule 23).

The outcome of adjudication, however, is not confidential unless the adjudicator makes an order (at their own initiative, or at the request of a party) that all or part of the decision is to remain confidential (rules 23 and 39).

The approach to confidentiality outlined above is not intended to, and will not, prevent the gathering and use of data for monitoring, evaluation, research and reporting purposes. If information is used for those purposes, the Rules require it will not be published in a form that could reasonably be expected to identify a specific person.

Our thinking was when parties reach a voluntary agreement about their dispute in a facilitation or mediation, they get to control who knows about it. When an adjudicator decides the dispute for them, it is more like going to court; the parties can talk about the outcome with others. In our initial consultation in April 2019, we received a lot of feedback asking that these outcomes be shareable. This has the benefit of everyone learning from the outcome, and it provides more transparency for brigade members and members of the community. If Fire and Emergency has done something wrong, we want to learn from our mistakes and be held accountable for our actions. That said, the adjudicator can make a confidentiality order (at their own initiative or at the request of a party) to keep all or part of the decision confidential in certain circumstances (rule 39).

Table 4: Level of support for the confidentiality rules

Option (as worded in survey)	Total number of online submitters	Percentage of online submitters
Supported	15	65
Supported but suggest some changes*	4	17
No view as not seen as overly important aspect to the submitter	2	9
Object to some aspect of the rule	2	9

* Of these four, only one outlined the change sought and the suggested change is not necessary as it was already covered in the Rules.

Submitter comments on the confidentiality rules

The comments from the two submitters who indicated they objected to some aspects of the Rules were:

- "I understand why this provision is in the process. However, it is better practice to release the outcomes of an adjudication with the party names removed so that others can see the thinking of the adjudicator on the matter. This will help to educate others."
- "I consider that the default position should be confidentiality rather than an option. In each case where it is considered necessary to have publication, the parties should either agree or one of them should make an application and make a case as to why there should be publication."

In response, we do not believe there is any need to change this rule, but we will provide greater clarity on how this rule works in subsequent guidance and/or promotional material. The statement that an outcome is not confidential is not a requirement or permission to publish the whole of it. It simply says you are not prohibited from sharing it. We note also that the Privacy Act 1993 applies to the disclosure of personal information, which includes information about the outcome of an adjudication that identifies individuals.

Rule 47(2) is the important one for publication: "The administrator must ensure that, before publishing case studies, appropriate safeguards (such as anonymisation or redaction) are in place, to protect the privacy of the parties."

The way the Office of the Privacy Commissioner publishes case notes is an example of how this is done (e.g. Case note 302612 [2020] NZPrivCmr 4: Agency withholds information to protect manager's privacy). Parties are not named, but are identified by broad category – for example, "an employee". So, in the Fire and Emergency Dispute Resolution Scheme, the reference might be to a "Fire and Emergency volunteer", for example. We expect this issue will be addressed in more detailed guidance; for example, in directions to the Scheme Administrator to remove the names of individuals and other details that would identify them.

Our conclusion

We do not make any substantive changes to rules 23 or rule 39, given the level of support from submitters. However, we will give special attention to clarifying/explaining how these Rules work in subsequent guidance and promotional material for the Scheme.

Dispute resolution methods and procedures, including the role of lawyers, advocates and support people (rules 20–22)

What we proposed

The dispute resolution practitioner can run the process as they want to, provided they follow all the requirements of the Act and Rules. Parties to a dispute can have a lawyer or advocate, and support people.

Our thinking was that, because dispute resolution practitioners are skilled, independent professionals, they are in the best position to decide how the process can best meet the needs of the parties, so we would leave the details of how to run the process to them. We have obligations under the Act and some minimum requirements in the Rules, e.g. to have a process that is fair and satisfies natural justice, so any process still has to meet these obligations.

We believe that the parties should be able to use a lawyer or advocate to represent them through the process, if they wish to do so. And we know that pursuing a dispute against Fire and Emergency can be stressful, so we want to make sure that parties can have up to two support people

throughout the process as well. In some cases, e.g. a tikanga Māori process, it may be appropriate to have more support people involved. The dispute resolution practitioner will work with the parties to have the best process possible.

Table 5: Level of support for proposed dispute resolution methods and procedures rules

Option (as worded in survey)	Total number of online submitters	Percentage of online submitters*
Supported	18	78
Supported but suggest some changes	3	13
Object to some aspect of the rule	1	4
Not answered	1	4

*Percentages do not total to 100% due to rounding.

The above statistics show a reasonably strong level of support for the rules as written, but we acknowledge there are views on either side of this – for example, some who say that we must ensure people are able to have lawyers and advocates, and others who suggest that it should not be adversarial, or that allowing lawyers will favour one party over the other. This specific issue is discussed below.

Lawyers

The submitters who supported the rule but suggested some change to it made the following comments:

- "Lawyers, advocates and support people should be made available to all, we had one crew member who was wrongly removed and should have been supported by a lawyer and he would have won the case of harassment and bullying."
- "Allowing legal counsel needs to be balanced between the parties. For example, if one party attends with two or three legal counsel and the other party does not have such counsel then the process becomes unfair. If legal representation is instigated by a party one option is for that party to contribute to the other party's legal costs. This has been in the past with other DRS."
- "Unworkable. Potentially a large number of persons could be present at the request of either party leading to a stressful and convoluted mediation/dispute process. If one party elects to have a lawyer present, then the other party to ensure fairness would be obliged to engage a similar qualified person.

  Surely the mediator/adjudicator would have enough legal experience/knowledge to ensure a fair and equitable outcome that would stand the scrutiny of a public process/outcome.

  The involvement of lawyers within a process will lead to increased costs and lengthy meetings. In the case of volunteers, is FENZ purporting to meet these fees for either party?"

These comments led us to revisit our thinking around representation (rule 21) and awarding of costs (rule 38).

Our starting premise in designing these rules (and the various options for them) has always been to try to avoid any imbalance of power between parties and to reduce barriers (either real or perceived) to applying to the Scheme.

We considered amending rule 21 so that parties are not permitted to be represented by lawyers or advocates in facilitation or mediation. This approach is more consistent with facilitation and mediation practices generally, as the purpose of these is to reach a mutually agreeable result. Representation would have remained as of right for adjudication because that process results in a

binding decision made by an adjudicator, and is more similar to a court process. In that situation, where parties are bound to a decision that could affect their rights and interests, they should be able to use lawyers and advocates if they wish to do so.

We thought that if lawyers were allowed at facilitation and mediation, potential applicants might feel that they could not go to facilitation or mediation without paying for representation, as they could reasonably assume that Fire and Emergency would have representation, and so they would need to do the same. This could mean applicants would be put off by the cost of representation and the feeling of the mediation/facilitation becoming more court-like. Keeping mediation and facilitation lawyer-free would mean that it was just the parties and the dispute resolution practitioners in the room, which may feel more welcoming.

But, thinking about it further, we considered that, even if Fire and Emergency didn't have representation in the room, applicants would know that Fire and Emergency would have access to them and their advice at all points prior to entering the room. Rather than the absence of Fire and Emergency representation meaning that applicants would feel that they could easily apply to the Scheme without the additional costs of representation, it would have the inverse effect: applicants would feel that Fire and Emergency were able to access advice/support that the applicants could not, creating a power imbalance that the applicants couldn't rectify by appointing representation. This would disincentivise people from applying.

That lead us back to the rule as written in the consultation version, which is that a party to a dispute may be represented, or assisted, at any meeting or hearing that forms part of a dispute resolution process, by a lawyer or advocate.

We were still slightly concerned about potential power imbalances between parties, so we revisited a pre-consultation version of the rule where the dispute resolution practitioner had the power to refuse representation after taking into account:

- The nature of the party, including, for example, whether the party is a corporation, a trust, or an individual under a disability; and
- The principles to be applied to the dispute resolution process; and
- The extent to which the party can represent themselves; and
- Any potential detriment to the other party or parties, or unfair advantage to the person seeking to be represented or to have an adviser or support person present; and
- The overall interests of justice.

We originally drafted the rule this way to reflect concerns that one party (i.e. Fire and Emergency) may be at an advantage, in being able to be represented by lawyers, while the other is not. This would entrench an imbalance of power. We had also noted other approaches, such as the Disputes Tribunal, where people may not be represented by lawyers.

We amended this rule prior to consultation to simply confirm a right to be represented due to concerns that it may not be consistent with the principles of natural justice. While we did not intend that the rule as previously drafted inhibit people’s ability to be represented consistently with the interests of justice, it was clear that people were concerned that it could be abused.

As a result, we decided to leave any imbalance in use of lawyers to dispute resolution practitioners to manage in practice as part of their control of process. That is, we expect dispute resolution practitioners to manage any issues of unfairness with the parties. And we are comfortable that the procedural requirements around fairness address concerns; for example, the administrator, and all dispute resolution practitioners, must act in accordance with what is fair and reasonable in all the circumstances (rule 20(5)(a) of the consultation version of the Rules). The final version of the Rules reflects this approach.

Awarding of costs

The debate around legal representation also made us revisit our views on awarding of costs, prompted by a comment made by a submitter which is already presented in the section on lawyers above but reproduced here:

"Allowing legal counsel needs to be balanced between the parties. For example, if one party attends with two or three legal counsel and the other party does not have such counsel then the process becomes unfair. If legal representation is instigated by a party one option is for that party to contribute to the other party's legal costs. This has been in the past with other DRS."

Under the consultation version of the Rules, the only person who may receive an award of costs is the *successful applicant*. This includes legal costs, so we did not name them preferring not to limit what kind of reasonable costs might be covered.

However, we did note that there are other approaches; for example, section 102 of the Residential Tenancies Act 1986 allows for the Tenancy Tribunal to award costs where any of the parties is represented by counsel and, in such a case, a party can be ordered to pay another party the reasonable costs of that other party.

Based on that, and the potential for a respondent to be a named person rather than FENZ, we opted to broaden who may receive an award of costs. We made a change so that the adjudicator can award costs in favour of any successful party, other than Fire and Emergency (we retained the position that no one can be ordered to pay Fire and Emergency's costs, that is Fire and Emergency must always bear its own costs regardless of the outcome). The costs awards remain subject to the total cap on payment of money.

Our conclusion

Legal representation

We kept rule 21 (whereby a party to a dispute may be represented, or assisted, at any meeting or hearing that forms part of a dispute resolution process, by a lawyer or advocate) in the final version of the Rules (as rule 22). We prefer to leave any imbalance in use of lawyers to dispute resolution practitioners to manage in practice as part of their management of the process. We would expect them to manage any issues of unfairness with the parties. We are comfortable that the procedural requirements around fairness address concerns; for example, the administrator, and all dispute resolution practitioners, must act in accord with what is fair and reasonable in all the circumstances (rule 20(5)(a)).

Awarding of costs

We amended the costs rule so that any successful party (other than Fire and Emergency) can be awarded costs; in the consultation proposal, only the applicant (if successful) could be awarded costs.

Support people

In its submission, the UFBA concluded that its members (96% of the UFBA survey respondents) indicated that two support people was enough, and it is satisfied that there is flexibility under rule 22(2) for additional support people to be present in some circumstances. However, it recommended that the Rules specify that the number of support people is flexible for marae-based processes, where parties agree, to ensure Fire and Emergency meets its obligations to tangata whenua and uphold its commitment to Te Tiriti O Waitangi.

In response, we note the following rules:

- The dispute resolution practitioner may allow additional support people to be present if they are satisfied that it would not be detrimental to the dispute resolution process (rule 22(2) in the consultation version of the Rules).
- The principles that the Scheme Administrator and dispute resolution practitioner must apply to the dispute resolution process include adopting tikanga Māori practices (rules 24[3] and 20(4)[4]).

However, to avoid an unintended unnecessary step in the dispute resolution process, we amended the relevant rule to make it clear that if tikanga Māori practices are adopted, the parties do not have to apply to have more than two support people; they have this as of right.

Our conclusion

We amended the rule to make it clear that if tikanga Māori practices are adopted, the parties do not have to apply to have more than two support people; they have this as of right.

Other Part 3 rules

The other Part 3 (dispute resolution process) rules include rules about the principles to be applied to the process (including the proposed approach to tikanga Māori practices), conflicts of interest, and the adjudication process (including fast-track adjudication).

We asked submitters if there were any rules they would like to comment on. A total of 21 of the 23 online submitters responded "no".

Who should be able to ask for adjudication if facilitation or mediation is unsuccessful?

One submitter, who did not complete the online survey electing to make a written submission, made the following comment on rule 26 (i.e. If the parties fail to resolve their dispute through facilitation or mediation, the applicant may ask the administrator to have the dispute resolved by adjudication):

"If conflict unresolved at mediation then only applicant can apply for adjudication. Why not either party. If the conflict is unresolved then it needs further attention as unresolved conflict will likely turn toxic."

We understand the point that the submitter is making. Our concern was, and is, that if the person raising the dispute has decided they do not want to deal with this anymore and they just want to move on, then a respondent could use the process to cause harm to the applicant by forcing them to continue to be in this space. We see this as being open to abuse and therefore to be avoided.

Timeframes for resolution

In its submission, the UFBA asked whether there was scope in the Rules to state an expectation that resolution would be achieved within two months unless circumstances warrant an extension of that time period. As context, UFBA members who responded to its survey ranked the statements "issue is

[3] From submissions, we see the heading of rule 24 – Principles to be applied in dispute resolution processes – led to some confusion with the principles of the Dispute Resolution Scheme itself (section 179 of the Fire and Emergency New Zealand Act 2017). We have therefore changed the heading of rule 24 to "Minimum requirements for conduct of dispute resolution process".

[4] Rule 20(4) reads: "If requested by a party (whether before or during the dispute resolution process), tikanga Māori practices must be adopted as part of the dispute resolution process unless, in the particular circumstances, it is not reasonably practicable to do so."

dealt with quickly" and "a time limit must be placed on resolving issues" first and third respectively in order of importance;[5] the former was deemed either very important or important by close to 100 percent of respondents and the latter by around 90 percent. The UFBA added that the importance of speed in resolving issues is also borne out by empirical evidence from its work and experience in this area.

This issue was also raised during our April 2019 consultation on some high-level design elements of the proposed Scheme. At that stage, we concluded that it is not practical to have a one-size-fits-all, end-to-end process timeframe due to the multiple variations in steps that are possible, but the Rules could and should include a timeframe for any fixed steps. For this reason, the 25 November 2019 consultation version of the Rules contained timeframes for the following steps:

- accepting or rejecting application (rule 13)
- appointing an adjudicator for disputes accepted for fast-track adjudication (rule 15)
- review of administrator's decision to refuse application (rule 18).

Our views on this issue and the rationale for them remain unchanged, so we will not introduce an overall timeframe expectation rule. However, in addition to any contractual key performance indicators that the Board may place on the Scheme Administrator, the Scheme Administrator will need to include in their annual report to the Fire and Emergency Board information relating to the average length of time to resolve a dispute (shown separately by facilitation, mediation, adjudication (other than fast-track adjudication), and fast-track adjudication (rule 48). Moreover, the time typically taken to resolve a dispute is explicitly included as a factor to be considered in the regular independent review of the Scheme (rule 50), with those reviews being charged with assessing the effectiveness of the Scheme and whether it is fit for purpose.

Status of all cases to be reviewed weekly (with feedback to all parties)

The UFBA submission queried whether there was scope in the Rules for this expectation.

In response, we note that the rules require that the process adopted by a dispute resolution practitioner ensures that all parties are kept informed of the progress of their dispute. We believe that level of specificity is appropriate for the Rules and anything beyond that (such as specifying time intervals) is more appropriately dealt with in operational guidelines and/or contract service level specifications.

Our conclusion

We have not made any changes to the Part 3 rules, other than those already outlined in the separate sections above concerning lawyers and support people.

[5] The second-ranked statement in the UFBA's survey was "confidentiality of process, participants and outcome".

Part 4 of the Rules: Remedies, recommendations, declarations and orders

What is covered in this Part

Part 4 contains the proposed rules around the types of remedies available under the Scheme, when costs can be awarded and the nature of the recommendations an adjudicator can make to Fire and Emergency.

What we proposed

The rules do not limit what can be mutually agreed by way of remedies in facilitation or mediation. In contrast, the rules do provide for the remedies available in an adjudication since they will be the subject of a determination made by an adjudicator.

An adjudicator can award a party a variety of remedies, including compensation of up to $15,000 and a public apology. They also have the authority to award any remedy that they think is appropriate in the circumstances. For Fire and Emergency volunteers, there are some additional remedies that can be awarded, including reinstatement, if that is appropriate.

The adjudicator also has the authority to make recommendations to Fire and Emergency about how it can prevent similar problems from happening again. For volunteers, these recommendations can include what Fire and Emergency should do to prevent a volunteer from being harassed again and what should happen to the person who treated the volunteer badly. The adjudicator can recommend that:

- Fire and Emergency take disciplinary action against that person
- the person be trained or monitored in some way
- if that person is an employee, that Fire and Emergency should investigate that person.

These recommendations are not binding on Fire and Emergency, and the adjudicator cannot make them binding.

The adjudicator also has the authority to award costs, e.g. lawyer's fees, to the successful applicant (not other parties). The costs and any other compensation can be up to the $15,000 total limit (as set by the Act).

If Fire and Emergency personnel were acting in good faith while doing their job, they will not be personally responsible for paying any money. In that case, the adjudicator may direct Fire and Emergency to pay the money instead.

Note: We asked volunteers their views on this provision in a separate question, which is discussed later.

Remedies, recommendations and costs the adjudicator can award (rules 35–38)

There was a specific question on these rules in the survey.

Table 6: Level of support for the rules around the remedies, recommendations and costs the adjudicator can award

Option (as worded in survey)	Total number of online submitters	Percentage of online submitters
Supported	11	48
Supported but suggest some changes	6	26
Object to some aspect of the rule	4	17
Not answered	2	9

Concerns from submitters who supported these rules but suggested some changes or submitters who objected to some aspect of the rules related to the:

- $15,000 monetary compensation and awarding of costs combined limit, which they saw as being too low
- rule that an adjudicator could only make non-binding recommendations to Fire and Emergency (rule 37).

Restorative justice

A submitter suggested the following additions to the remedies available under the Scheme:

"The adjudicator should have a commitment to restorative justice and restorative practice where there have been disputes causing harm to any party. To this end, an option of a referral to a restorative justice facilitator should be included."

We agree that restorative processes are valuable, particularly where a dispute has occurred that could affect an entire Fire and Emergency brigade. It is therefore intended that Fire and Emergency undertakes restorative processes to assist brigades to heal and move on from disputes.

However, the Rules need to allow for flexibility in the remedy – mandating that a person take part may not be productive. We therefore prefer to frame this as giving an adjudicator the ability to recommend to Fire and Emergency that it carry out a restorative process. This would also take the process outside the Scheme and place the responsibility on Fire and Emergency to organise and pay for the process. Gaining participation of the parties would be part of that process and could follow usual approaches to restorative practice.

Our conclusion

We introduced a new subrule under which an adjudicator may recommend to Fire and Emergency that it carries out a restorative process between parties, and with any other person who may be impacted by the dispute or its resolution. As with all other existing recommendations in the consultation draft of the Rules, any such recommendation made by an adjudicator will be non-binding.

$15,000 limit

Including an upper limit of $15,000 for combined compensation and costs (rules 35(d) and 38(3)) reflects the limit required by the Fire and Emergency New Zealand Act (section 180(4)) under which the Dispute Resolution Scheme Rules are approved. The Rules cannot increase that limit or allow for separate awards that would exceed the limit in total.

Adjudicator may make recommendations to Fire and Emergency (rule 37)

The proposed rule was that if an adjudicator finds that Fire and Emergency workplace conduct or practices have significantly contributed to a dispute, they may make recommendations to Fire and Emergency as to the action it should take to prevent similar problems occurring in the future. An adjudicator may also find that a Fire and Emergency volunteer has either been harassed while carrying out their Fire and Emergency duties or treated adversely while carrying out their Fire and Emergency duties on the ground that the Fire and Emergency volunteer is, or is suspected or assumed or believed to be, a person affected by family violence.

Comments on this rule included:

"This statement [The adjudicators can make recommendations to Fire and Emergency, so that Fire and Emergency can improve their practices and processes, but Fire and Emergency is not obligated to accept the recommendations. This is particularly the case when it comes to recommendations about employees. Fire and Emergency has obligations to its employees that it must follow, regardless of what any adjudicator recommends.] still allows for the protection of career staff against volunteers, pretty much says they don't have to act against a career staff member if found to be wrong, this happens now and is very frustrating for volunteers when career staff are protected and volunteers told to go away when trying to make a complaint against a career staff member."

The UFBA submission suggested that a process is built into the Rules whereby adjudicators' recommendations are published and acted upon, to give some accountability towards a continuous improvement process. In short, we agree to this suggested change, which was also proposed in another submission. Our fuller response is in our discussion of the Scheme Administrator's annual report to the Fire and Emergency Board.

Our thinking behind rule 37 remains that adjudicators can make recommendations to Fire and Emergency so that the organisation can improve its practices and processes, although Fire and Emergency is not obligated to accept the recommendations. This is particularly the case when it comes to recommendations about employees. Fire and Emergency has legal obligations that it must follow, regardless of what any adjudicator recommends.

The above explanation was included in the online survey. To expand further here, this Rule followed section 123(1)(ca) and (d) of the Employment Relations Act 2000 (ERA). One of the policy intentions for the Dispute Resolution Scheme Rules is to ensure there is a process for volunteers that parallels what is available for employees through the ERA. Given that, it would not be appropriate to provide for binding orders when volunteers are the aggrieved party when there can only be recommendations when employees are the aggrieved party. This would create an inequity when the intent of the Scheme is to create equity.

We also elected to make the recommendations non-binding because the expectation is that Fire and Emergency will properly consider and address the recommendation. Once Fire and Emergency has carried out the appropriate process that may be required to address the recommendation (for example, a disciplinary process), it may be more appropriate for Fire and Emergency to take a different action. It may also be that Fire and Emergency has access to information that was not relevant to the dispute resolution process but that is relevant to determining what action should be taken in respect of an individual, this could include taking more serious action than is recommended by the adjudicator.

In short, the rule does not infer nor imply that by making the recommendations non-binding, Fire and Emergency can ignore these.

Person affected by family violence

Proposed rule 37(2)(b) provides an adjudicator may make recommendations (to Fire and Emergency) if they find that a Fire and Emergency volunteer has been treated adversely in the course of carrying out their Fire and Emergency duties on the ground that the Fire and Emergency volunteer is, or is suspected or assumed or believed to be, a person affected by family violence.

One submitter suggested for accuracy purposes this section should read "…. a person affected by family or *domestic violence*".

Our explanation and response is that the wording we used in this rule is the same as that used in section 123(1)(d) of the ERA. Including "or domestic violence" could create confusion because it is not included in section 123(1)(d) or section 108A of the ERA, which the rule refers to as the way to interpret "adverse treatment". We would need to create a definition of domestic violence, which would then widen the scope of the rule beyond what is intended, i.e. to create a parallel employment regime for volunteers. We therefore intend to keep this rule's wording as is (i.e. as contained in the 25 November 2019 consultation version of the Rules).

Submitters' comments on other Part 4 rules

Submitters were also given the opportunity to comment on any other rules in Part 4.

Three suggestions were made:

- "Rule 36 should state for the avoidance of doubt that an adjudicator can uphold a dismissal, demote a volunteer, or discharge a volunteer. A Brigade may lodge a dispute for a situation where an initial outcome [does] not sufficiently sanction a volunteer. The adjudicator should have power to impose any disciplinary sanction what so ever consistent with the principles in Rule 24."

  Our response: This suggestion is not consistent with the policy intent, so we are not persuaded to take the approach suggested. The adjudicator will be able to uphold a dismissal where it is challenged by a volunteer. However, it would not be appropriate or fair for the adjudicator to be able to impose a new or different disciplinary sanction on a volunteer, such as demotion or discharge, because the adjudicator cannot impose a disciplinary sanction on an employee. However, the adjudicator could direct Fire and Emergency to reconsider its decision. The adjudicator can also make comments about what may be the appropriate sanction, including any recommendations that may be relevant under rule 37.
- "A formal rule should exist that would provide an automatic notification to FENZ executive of an unresolved issue being managed or held at a region level beyond 60 or 90 days. Currently there is no accountability or emphasis at region level to push for timely complaints resolutions."

  Our response: This is a suggestion for the complaint process not the dispute process. That said, we also note that the proposed Dispute Resolution Scheme Rules might be of assistance here as they provide a deadlock provision for complaints. Rule 9(4) provides that the Scheme Administrator may accept an application that has been made before the Fire and Emergency complaint process has been completed if it has been at least 90 days since the complaint was made to Fire and Emergency and the administrator is satisfied that the Fire and Emergency complaint process is not being progressed at a reasonable rate.
- The UFBA commented on the appeals rule (rule 41). We discuss this aspect of the Scheme in more detail below.

Appeals

Proposed rule 41 provided that a party aggrieved by a decision made under the Scheme may appeal to the District Court and that any such appeal must be made in accordance with section 186 of the Fire and Emergency Act (which requires appeals to be made in accordance with court rules and specifies a timeframe for lodgement).

In its submission, the UFBA states it believes that expecting volunteers to pursue an issue through the District Court would be unfair, intimidating and expensive and effectively would ensure they will not appeal. The UFBA recommends a formal appeal process be included as an integral part of this Scheme, with appeal to the District Court being a last resort.

In drafting the Rules, it was considered that it was not necessary to include a lower-level appeal within the Dispute Resolution Scheme because most disputes going through the Scheme will already have been through Fire and Emergency's internal complaint process. In effect, this will be an appeal from an earlier decision on their complaint. (Rule 8 requires, with some exceptions, that the Dispute Scheme Administrator may not accept an application where the applicant has not first attempted to resolve the dispute through the Fire and Emergency complaint process.)

Including a right of appeal within the Dispute Resolution Scheme would also impact a timely resolution, which may undermine the efficiency of the Scheme. We note that not only will most disputes have already been through an internal Fire and Emergency complaint process, they may also have been through mediation before going to adjudication and obtaining a decision. There would also always be the ability to appeal to the District Court even if a lower-level appeal process was included. Including a lower-level appeal process will increase the time that a dispute may take to reach a final conclusion.

What we introduced

After further consideration, we introduced a limited right of review where the interests of justice require it, similar to what is available in the Disputes Tribunal. This would provide a lower-level of appeal where the outcome for a party was adversely affected because an unfair process was followed, the adjudicator made a material error of fact or law, or relevant facts became known after the adjudication that could not reasonably have been known or obtained before the adjudication. It would not provide an opportunity for review or appeal where a party disagreed with the outcome. In that case, the party would have to appeal to the District Court.

More specifically, we introduced the following process:

- An application for review of an adjudicator's decision must be made to the administrator within 25 working days of the date of the adjudicator's decision
- The administrator must refer the application to a different adjudicator (the reviewer) to consider.
- The reviewer could then:
    - decline the application for a review
    - accept the application for a review and consider it on the papers, including any additional information that was not considered as part of the original adjudication, and issue a decision without hearing from the parties in person.

This process is different from the rehearing process in the Disputes Tribunal, where an application for rehearing is considered by the referee who heard the original dispute and, if granted, an in-person rehearing is held with a new referee. We have proposed a different approach that takes into account the principles of independence, fairness, efficiency and effectiveness. Our proposed approach ensures that an impartial decision-maker is involved in determining the application for a review. If the review is granted, it assists with a speedier resolution than if a new hearing needed to

be held. We consider that most evidence will have been aired through the original hearing and if the reviewer needs to hear further from the parties, they can obtain this in writing.

We considered the option of introducing a mandatory peer review process to the adjudication instead of the separate review process described above. The UFBA also recommended this in their submission. Mandatory peer review would require that an adjudicator provide their draft decision to another adjudicator for review before it is issued to the parties. We understand that this is often done informally as part of the adjudication process anyway so would not add as much time as introducing a separate review process. However, we considered this a less desirable option because it is less transparent and creates complexity around what could happen should the peer reviewer have a substantive disagreement with the adjudicator.

We note that the ability to apply for a review and the proposed process is not the unfettered right of appeal sought by the UFBA. However, we consider it balances the parties' needs for timely resolution and an efficient process, with accessibility of a review or appeal where the interests of justice require it.

Volunteers' views on rule 35(2): Limit on adjudicator's ability to direct Fire and Emergency personnel to pay compensation

This was a question in the survey for Fire and Emergency volunteers only.

This rule proposed that an adjudicator must not direct a member of Fire and Emergency personnel to pay compensation if, at the relevant time, the person was acting in good faith while performing or exercising their functions, powers, and duties under the Act or regulations and, in that case, the adjudicator may direct Fire and Emergency to pay that compensation.

This proposal recognises that where the actions of Fire and Emergency personnel have caused harm and compensation would be appropriate, the organisation should pay that compensation rather than the member of personnel if that person was acting in good faith while doing their job for Fire and Emergency. However, Fire and Emergency personnel would be personally liable to pay compensation for bad faith actions or actions that were not part of doing their job; for example, sexual misconduct. This approach reflects normal statutory limitations of liability for all members of personnel as well as submitters' feedback (on our April 2019 Scheme design proposals) that volunteers not be subject to awards against them for unpaid work.

Level of support for rule 35(2)

Thirteen volunteers responded to this question, with nine supporting it, three supporting it with suggested changes and one objecting to it.

The comments from the three volunteers who indicated they supported it but suggested changes and our responses are:

- "I like the impartiality of the adjudicator being from outside, but they need to have an understanding of the job, the role and the people in it, to rule accurately on a dispute."

  Our response: This is a fair comment but not something we can deal with in the Rules. It is more about guidance and training that Fire and Emergency will give to the Scheme Administrator and dispute resolution practitioners. We want to ensure adjudicators have the information they need to make good decisions, including the organisational contexts.
- "Make clear in what circumstances someone would not be supported or are considered to have acted in 'bad faith'. This should be done to reassure volunteers that Fire and Emergency is behind them and will provide support if things go wrong."

  Our response: There will be more details in the operational guidance, rather than the Rules.

- "This should be extended to all cases in that a volunteer should never be liable to pay compensation."

  Our response: Our proposed approach is consistent with normal rules and with Fire and Emergency not being required to pay compensation where a volunteer caused harm through actions that were not within their job. If followed, this suggestion would mean that volunteers who were harmed by other volunteers in this way could not receive compensation.

The comment from the one volunteer that objected was:

- "The scheme should not allow any volunteer to be directed to pay compensation, it should only allow compensation to be paid by FENZ as a body corporate. By comparison, an employee who commits a bad faith action cannot pay compensation to another person – they can only be sanctioned by their employer by warning, reprimand for [sic] dismissal. This submission is made in the context of a scenario where a Volunteer Leader is directed to personally pay compensation to another volunteer. This is not appropriate; the volunteer leader should instead be disciplined. The volunteer could still be compensated by FENZ as a corporate."

  Our response: Our approach follows normal rules around liability for employees of government agencies, which in the context of Fire and Emergency also apply to volunteers. The Crown Entities Act excludes liability for acts or omissions done in good faith and in the performance or intended performance of Fire and Emergency's functions. As with employees, where a volunteer does something in good faith in the course of their duties that causes harm, they will not be expected to pay compensation for that harm.

Our conclusion

We did not make any changes to rule 35(2) – Limit on adjudicators' ability to direct Fire and Emergency personnel to pay compensation – but will ensure the operational guidance on it is comprehensive.

Part 5 of the Rules: Administration of Scheme

What is covered in this Part

Part 5 contains the proposed rules around the appointment and functions of the Scheme Administrator, appointment of dispute resolution practitioners, and the process for any complaints about the Scheme.

Table 7: Level of support for the rules around the administration of the Scheme (rules 42–50)

Option (as worded in survey)	Total number of online submitters	Percentage of submitters*
Supported	16	73
Supported but suggest some changes	3	14
Object to some aspect of the rule	1	5
Not answered	2	9

*Percentages do not total to 100% due to rounding.

Submitters' comments on these Rules (rules 42–50)

Who can be the Scheme Administrator

The RPA noted that rule 42(2) refers to the appointment of the administrator as potentially being "…. a FENZ employee, a person associated with FENZ, or a person wholly independent of FENZ". [We] suggest a better description of 'a person associated with FENZ' may be 'a FENZ Authorised Person' as this included FENZ volunteers and others with a recognised association with FENZ."

Our response is that it was not our intention when drafting this rule to exclude volunteers; the intent was to include them (captured under "a person associated with FENZ"). However, we have now made the Rule clearer, employing the following wording: "The person appointed may be a FENZ employee, a person associated with FENZ (including, for example, a FENZ volunteer or a FENZ contractor), or a person wholly independent of FENZ."

Another submitter commented, "Suggest the administrator of the scheme should be separate from the employment structure, and report directly to the board rather than to the CEO or senior employees, for purposes of independence."

We consider that it would not undermine the administrator's independence if the Scheme Administrator were an employee and we want to provide flexibility as to whom the administrator could be. If the Scheme Administrator was an employee, then we could put other systems in place to ensure sufficient independence. For example, they would be separate from the management lines involved in the People and Service Delivery branches; they may have direct reporting lines to a Deputy Chief Executive. It may be of interest to know that Fire and Emergency has decided to engage a person or organisation external to Fire and Emergency as the Scheme Administrator, and a procurement process for that purpose has been commenced. However, the Rule has been written to allow flexibility in future to change who the Scheme Administrator is (external versus internal to Fire and Emergency) without having to modify the Rule in order to make that change.

Our conclusion

We changed the wording of rule 42(2) to make it clearer that a Fire and Emergency volunteer is not excluded from being the Scheme Administrator.

The Scheme Administrator's annual report to the Board should include any recommendations made to Fire and Emergency by adjudicators

Proposed rule 48 contained a list of what information, as a minimum, the annual report must include. An individual suggested that recommendations to Fire and Emergency made by adjudicators under rule 37 be added to the list. Less specifically, the UFBA's submission recommended that the Rules have a built-in process for adjudicators' recommendations to be published and acted upon to give some accountability towards a continuous improvement process.

More generally, some submitters were concerned about adjudicators' recommendations not being enforceable (see discussion of rule 37 under Part 4 earlier in this paper). As discussed, we do not intend changing that.

We do believe that transparency around recommendations made would allow people to hold Fire and Emergency accountable to implementing recommendations (e.g. through requiring Fire and Emergency to explain why it has not implemented them). However, we need to balance this with privacy concerns around the individuals who may be the subject of the recommendations under rule 37(2). As such, the inclusion in the annual report of recommendations will be subject to a requirement to take appropriate safeguards to protect privacy of individuals. This would include anonymising any recommendations made in respect of identifiable individuals.

Our conclusion

We added recommendations made by an administrator to Fire and Emergency to the list of items to be included, at a minimum, in the Scheme Administrator's annual report to the Fire and Emergency Board with appropriate safeguards to protect privacy of individuals.

Interval between independent review of the Scheme

As the accountable body for the Scheme, the Fire and Emergency Board will periodically appoint an independent reviewer to carry out an evaluation of the Scheme. This ensures that it remains an effective and fit-for-purpose scheme.

Rule 50 in the 25 November 2019 consultation version of the Rules required the Board to appoint an independent reviewer to carry out an evaluation of the Scheme within 18 months of these rules coming into force, and at periods of no more than three years following the preceding evaluation.

One submission suggested an interval of five years rather than three years.

The "no more than three-yearly intervals" was selected because of the feedback we received as part of our April 2019 consultation on some high-level design elements of the proposed Scheme. We proposed "no more than five-yearly intervals" and changed it to "no more than three-yearly intervals" following feedback. We have opted to retain the "no more than three-yearly intervals".

Attachment 1: Version of Rules employed in the consultation [dated 25 November 2019]